Nos. 14-556, 14-562, 14-571, 14-574

FILED
MAR 4 - 2015

IN THE

Supreme Court of the United States

No. 14-556

JAMES OBERGEFELL, *et al.*, and BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ELECTED OFFICIALS AND FORMER OFFICEHOLDERS OF MICHIGAN, OHIO, KENTUCKY, AND TENNESSEE, AND THE MICHIGAN AND OHIO DEMOCRATIC PARTIES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARK TOTTEN
MICHIGAN STATE UNIV.
COLLEGE OF LAW
648 N. Shaw Lane
East Lansing, Michigan 48824

DAVID PEPPER
OHIO DEMOCRATIC PARTY
340 E. Fulton Street
Columbus, Ohio 43215

GREGORY L. DISKANT
Counsel of Record
TRAVIS J. TU
JONAH M. KNOBLER
JENNY MA
D. BRANDON TRICE
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
gldiskant@pbwt.com

Attorneys for Amici Curiae

No. 14-562

VALERIA TANCO, *et al.*,

Petitioners,

—v.—

BILL HASLAM, Governor of Tennessee, *et al.*,

Respondents.

No. 14-571

APRIL DEBOER, *et al.*,

Petitioners,

—v.—

RICK SNYDER, Governor of Michigan, *et al.*,

Respondents.

No. 14-574

GREGORY BOURKE, *et al.*, and TIMOTHY LOVE, *et al.*,

Petitioners,

—v.—

STEVE BESHEAR, Governor of Kentucky, *et al.*,

Respondents.

LIST OF AMICI CURIAE

This brief is filed on behalf of the following 156 electe officials and former officeholders,* joined by the Michiga Democratic Party and the Ohio Democratic Party:

Councilmember BURKLEY ALLEN,
Metro Nashville, Tennessee

Senator JIM ANANICH,
27th Senate District, Michigan

Councilmember CHRIS ANDERSON,
City of Chattanooga, Tennessee

Senator (Emeritus) GLENN S. ANDERSON,
6th Senate District, Michigan

Representative NICKIE ANTONIO,
13th House District, Ohio

President JOHN C. AUSTIN,
State Board of Education, Michigan

Councilmember STEVEN W. BAKER,
City of Berkley, Michigan

Councilmember BRADY BANKS,
Metro Nashville, Tennessee

Representative (Emeritus) VICKI L. BARNETT,
37th House District, Michigan

Congresswoman JOYCE BEATTY,
3rd Congressional District, Ohio

Regent MICHAEL J. BEHM,
University of Michigan

* All elected officials join this brief in their personal capacities. The ir dividual *amici*'s support for Petitioners should not be taken as the off cial position of their office, administration, or government body.

Regent MARK J. BERNSTEIN,
University of Michigan

Senator STEVEN M. BIEDA,
9th Senate District, Michigan

Representative HEATHER BISHOFF,
20th House District, Ohio

Representative JANINE BOYD,
9th House District, Ohio

Council President SEAN BRENNAN,
City of Parma, Ohio

Councilmember SABRA C. BRIERE,
City of Ann Arbor, Michigan

Clerk & Register of Deeds LISA BROWN,
Oakland County, Michigan

Commissioner MARILYN BROWN,
Franklin County, Ohio

Recorder TERRY J. BROWN,
Franklin County, Ohio

Clerk BARB BYRUM,
Ingham County, Michigan

Senator CAPRI CAFARO,
32nd Senate District, Ohio

Councilmember PAMELA CAMERON,
City of University Heights, Ohio

Representative (Emeritus) JOHN PATRICK CARNEY,
22nd House District, Ohio

Representative STEPHANIE L. CHANG,
6th House District, Michigan

Representative JOHN RAY CLEMMONS,
55th House District, Tennessee

Representative KATHLEEN CLYDE,
75th House District, Ohio

Representative WILLIAM T. COCHRAN,
67th House District, Michigan

Congressman JOHN CONYERS,
13th Congressional District, Michigan

Mayor DAVID W. COULTER,
City of Ferndale, Michigan

Mayor JOHN CRANLEY,
City of Cincinnati, Ohio

Councilmember LLOYD C. CREWS,
City of Southfield, Michigan

Drain Commissioner PAT CROWLEY,
Kalamazoo County, Michigan

Councilmember ANTHONY DAVIS,
Metro Nashville, Tennessee

Commissioner JOHN P. DEGENAER JR.,
Dickinson County, Michigan

Regent LAURENCE B. DEITCH,
University of Michigan

Representative BRANDON C. DILLON,
75th House District, Michigan

Vice Mayor DEREK J. DOBIES,
City of Jackson, Michigan

Commissioner SHARLAN DOUGLAS,
City of Royal Oak, Michigan

Representative DENISE DRIEHAUS,
31st House District, Ohio

Commissioner KYLE K. DUBUC,
City of Royal Oak, Michigan

Representative FRED DURHAL III,
5th House District, Michigan

Councilmember JACK EATON,
City of Ann Arbor, Michigan

Mayor JIM ELLISON,
City of Royal Oak, Michigan

Trustee DUSTY FARMER,
Oshtemo Township, Michigan

Secretary MICHELLE J. FECTEAU,
State Board of Education, Michigan

Commissioner MICHAEL FISHER,
Isabella County, Michigan

Representative KELLY FLOOD,
75th House District, Kentucky

Commissioner DAN FOLEY,
Montgomery County, Ohio

Councilmember MYRON A. FRASIER,
City of Southfield, Michigan

Representative ERIKA GEISS,
12th House District, Michigan

Commissioner PETER GERKEN,
Lucas County, Ohio

Commissioner MARCIA GERSHENSON,
Oakland County, Michigan

Councilmember JULIE GRAND,
City of Ann Arbor, Michigan

Senator VINCENT GREGORY,
11th Senate District, Michigan

Representative CHRISTINE E. GREIG,
37th House District, Michigan

Representative TIM GREIMEL,
29th House District, Michigan

Representative VANESSA M. GUERRA,
95th House District, Michigan

Representative (Emeritus) ROBERT HAGAN,
58th House District, Ohio

Mayor Pro Tem BRIAN C. HARTWELL,
City of Madison Heights, Michigan

Mayor WILLIAM HEALY,
City of Canton, Ohio

Senator CURTIS A. HERTEL,
23rd Senate District, Michigan

Representative JON HOADLEY,
60th House District, Michigan

Senator MORRIS W. HOOD III,
3rd Senate District, Michigan

Commissioner KARA HOPE,
Ingham County, Michigan

Mayor BOBBY J. HOPEWELL,
City of Kalamazoo, Michigan

Senator HOON-YUNG HOPGOOD,
6th Senate District, Michigan

Representative MARCIA H. HOVEY-WRIGHT,
92nd House District, Michigan

Representative STEPHANIE HOWSE,
11th House District, Ohio

Representative JEFF M. IRWIN,
53rd House District, Michigan

Representative JONI JENKINS,
44th House District, Kentucky

Commissioner TED KALO,
Lorain County, Ohio

Treasurer WADE KAPSZUKIEWICZ,
Lucas County, Ohio

Clerk & Register of Deeds LAWRENCE KESTENBAUM,
Washtenaw County, Michigan

Commissioner TIM KILLEEN,
Wayne County, Michigan

Councilmember ZACH KLEIN, Esq.,
City of Columbus, Ohio

Senator DAVID M. KNEZEK JR.,
5th Senate District, Michigan

Commissioner CAROL N. KOENIG,
Ingham County, Michigan

Water Resources Commissioner CHRISTINE KOSMOWSKI,
Calhoun County, Michigan

Representative CHRISTIE BRYANT KUHNS,
32nd House District, Ohio

Commissioner ANDY LABARRE,
Washtenaw County, Michigan

Representative (Emeritus) COLLENE LAMONTE,
91st House District, Michigan

Representative DAVID LELAND,
22nd House District, Ohio

Representative MICHELE LEPORE-HAGAN,
58th House District, Ohio

Congressman SANDER LEVIN,
9th Congressional District, Michigan

Representative FRANK LIBERATI,
13th House District, Michigan

Commissioner JEFF LOHMAN,
Muskegon County, Michigan

Council Chair MYRON LOWERY,
City of Memphis, Tennessee

Commissioner MATT LUNDY,
Lorain County, Ohio

Commissioner JEREMY MAHKLE,
City of Royal Oak, Michigan

Mayor (Emeritus) MARK MALLORY,
City of Cincinnati, Ohio

Vice Mayor DAVID MANN,
City of Cincinnati, Ohio

Representative MARY LOU MARZIAN,
34th House District, Kentucky

Commissioner GARY R. MCGILLIVRAY,
Oakland County, Michigan

Representative (Emeritus) MARK S. MEADOWS,
69th House District, Michigan

Treasurer ANDREW E. MEISNER,
Oakland County, Michigan

Representative DEREK E. MILLER,
28th House District, Michigan

Commissioner FREDERICK J. MILLER,
Macomb County, Michigan

Treasurer (Emeritus) JONATHAN MILLER,
State of Kentucky

Trustee MARK E. MILLER,
Kalamazoo Charter Township, Michigan

Councilmember NANCY MOORE,
City of Shaker Heights, Ohio

Trustee BRIAN MOSALLAM,
Michigan State University

Representative JEREMY A. MOSS,
35th House District, Michigan

Commissioner JOHN O'GRADY,
Franklin County, Ohio

Representative KRISTY PAGAN,
21st House District, Michigan

Attorney General (Emeritus) JAMES PETRO,
State of Ohio

Representative (Emeritus) CONNIE PILLICH,
28th House District, Ohio

Commissioner TODD PORTUNE,
Hamilton County, Ohio

Executive RUSSELL M. PRY,
Summit County, Ohio

Representative DAN RAMOS,
56th House District, Ohio

Mayor CHASE RITTENAUER,
City of Lorain, Ohio

Representative SARAH B. ROBERTS,
18th House District, Michigan

Congressman TIM RYAN,
13th Congressional District, Ohio

Clerk & Register of Deeds CARMELLA SABAUGH,
Macomb County, Michigan

Representative HARVEY SANTANA,
9th House District, Michigan

Treasurer ERIC A. SCHERTZING,
Ingham County, Michigan

Senate Minority Leader JOE SCHIAVONI,
33rd Senate District, Ohio

Representative ANDY SCHOR,
68th House District, Michigan

Councilmember CHRIS SEELBACH,
City of Cincinnati, Ohio

Representative (Emeritus) KATE S. SEGAL,
62nd House District, Michigan

Councilmember YVETTE SIMPSON,
City of Cincinnati, Ohio

Representative SAM SINGH,
69th House District, Michigan

Councilmember P.G. SITTENFELD,
City of Cincinnati, Ohio

Councilmember KENSON J. SIVER,
City of Southfield, Michigan

Senator MICHAEL SKINDELL,
23rd Senate District, Ohio

Commissioner CONAN M. SMITH,
Washtenaw County, Michigan

Senator VIRGIL K. SMITH,
4th Senate District, Michigan

Councilmember DAVID M. SOLTIS,
City of Madison Heights, Michigan

Commissioner HOWARD T. SPENCE,
Eaton County, Michigan

Representative MICHAEL STINZIANO,
18th House District, Ohio

Board Member KATHLEEN STRAUS,
State Board of Education, Michigan

Governor (Emeritus) TED STRICKLAND,
State of Ohio

Clerk CHRIS SWOPE,
City of Lansing, Michigan

Representative EMILIA STRONG SYKES,
34th House District, Ohio

Senator CHARLETA TAVARES,
15th Senate District, Ohio

Mayor CHRISTOPHER TAYLOR,
City of Ann Arbor, Michigan

Representative JIM TOWNSEND,
26th House District, Michigan

Governor KIMBERLY A. TRENT,
Wayne State Board of Governors, Michigan

Mayor NATHAN TRIPLETT,
City of East Lansing, Michigan

Senator (Emeritus) NINA TURNER,
25th Senate District, Ohio

Vice President CASANDRA E. ULBRICH,
State Board of Education, Michigan

Representative (Emeritus) MARY H. VALENTINE,
91st House District, Michigan

Commissioner ILONA VARGA,
Wayne County, Michigan

Supervisor GARY I. WALKER,
Chocolay Township, Michigan

Mayor DAYNE A. WALLING,
City of Flint, Michigan

Senator REBEKAH L. WARREN,
18th Senate District, Michigan

Clerk NANCY WATERS,
Muskegon County, Michigan

Councilmember PETER WESTERHOLM,
Metro Nashville, Tennessee

Mayor NAN WHALEY,
City of Dayton, Ohio

Senator (Emeritus) GRETCHEN WHITMER,
23rd Senate District, Michigan

Mayor DENNIS R. WILCOX,
City of Cleveland Heights, Ohio

Representative ROBERT WITTENBERG,
27th House District, Michigan

Senator COLEMAN A. YOUNG,
1st Senate District, Michigan

Councilmember WENDELL YOUNG,
City of Cincinnati, Ohio

Commissioner HELAINE M. ZACK,
Oakland County, Michigan

Representative ADAM F. ZEMKE,
55th House District, Michigan

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 5

A. Ohio 6

B. Michigan 9

C. Kentucky 11

D. Tennessee 13

ARGUMENT 15

I. UNDER OUR CONSTITUTIONAL SYSTEM, THE BASIC RIGHTS AND EQUAL CITIZENSHIP OF MINORITY GROUPS ARE NOT SUBJECT TO THE POLITICAL PROCESS. 15

A. The Framers Intended Vigorous Judicial Review Where Minority Rights Are Abridged By Popular Vote. 15

B. This Court Has Rejected Deference To The Democratic Process Where Laws Target Disfavored Minority Groups. 18

II. PETITIONERS' CLAIMS ARE ESPECIALLY ILL-SUITED FOR RESOLUTION THROUGH THE POLITICAL PROCESS. 24

A. By Amending The States' Constitutions, These Laws Intentionally Made Democratic Change Impracticable. 25

B. These Laws Target A Small Minority With A History Of Discrimination And Limited Political Power..... 29

1. Gays And Lesbians Have Been Subject To An Extreme History Of Prejudice And Discrimination. 31

2. Gays And Lesbians Are Comparatively Lacking In Political Power. 33

3. Even Today, Gays And Lesbians Are Unable To Protect Themselves From Discrimination Through The Democratic Process. 38

CONCLUSION..... 43

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bourke v. *Beshear*,
996 F. Supp. 2d 542 (W.D. Ky. 2014) 11, 12

Bowers v. *Hardwick*,
478 U.S. 186 (1986) 19

Campaign for S. Equality v. *Bryant*,
2014 U.S. Dist. LEXIS 165913
(S.D. Miss. Nov. 25, 2014) 43

Chambers v. *Florida*,
309 U.S. 227 (1940) 18

DeBoer v. *Snyder*,
772 F.3d 388 (6th Cir. 2014) .....*passim*

Golinski v. *U.S. Office of Pers. Mgmt.*,
824 F. Supp. 2d 968 (N.D. Cal. 2012) 35, 39

Hunter v. *Erickson*,
393 U.S. 385 (1969) 26

Lawrence v. *Texas*,
539 U.S. 558 (2003) 19, 31

Log Cabin Republicans v. *United States*,
716 F. Supp. 2d 884 (C.D. Cal. 2010) 34, 35

Lucas v. *Forty-Fourth Gen. Assembly*,
377 U.S. 713 (1964) 19

Minersville Sch. Dist. v. *Gobitis*,
310 U.S. 586 (1940) ..... *passim*

Obergefell v. *Wymyslo*,
962 F. Supp. 2d 968 (S.D. Ohio 2013) 6, 8

Perry v. *Schwarzenegger*,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 29

Plyler v. *Doe*,
457 U.S. 202 (1982) 33

Romer v. *Evans*,
517 U.S. 620 (1996) 25

Rowland v. *Mad River Local Sch. Dist.*,
470 U.S. 1009 (1985) 30, 31, 36, 37

San Antonio Indep. Sch. Dist. v. *Rodriguez*,
411 U.S. 1 (1973) 30

Schuette v. *Coal. to Defend Affirmative Action*,
134 S. Ct. 1623 (2014) 3, 4, 15, 23

Thornburgh v. *Am. Coll. of Obstetricians & Gynecologists*,
476 U.S. 747 (1986) 16

United States v. *Carolene Prods. Co.*,
304 U.S. 144 (1938) 24, 25, 30

W. Va. State Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) ..... *passim*

Washington v. *Seattle Sch. Dist. No. 1*,
458 U.S. 457 (1982) 25

Whitney v. *California*,
274 U.S. 357 (1927) 15

STATE CASES

Baehr v. *Lewin*,
852 P.2d 44 (Haw. 1993) 9

Goodridge v. *Dep't of Pub. Health*,
798 N.E.2d 941 (Mass. 2003) 5

Ex Parte H.H.,
830 So. 2d 21 (Ala. 2002) 31

CONSTITUTIONAL PROVISIONS AND STATUTES

Defense of Marriage Act, Pub. L. No. 104-199,
110 Stat. 2419 (1996) 9, 11, 13

KY. CONST. § 233A (2004) 11

KY. REV. STAT. § 402.005 11

KY. REV. STAT. § 402.020 11

KY. REV. STAT. § 402.040 11

KY. REV. STAT. § 402.045 11

MICH. COMP. LAWS § 551.1 9

MICH. COMP. LAWS § 551.272 9

MICH. CONST. art. I, § 25 (2004) 10

OHIO CONST. art. XV, § 11 (2004) 7

OHIO REV. CODE § 3101.01 ..... 6, 7
TENN. CODE ANN. § 7-51-1801 40
TENN. CODE ANN. § 7-51-1802 40
TENN. CODE. ANN. § 36-3-113 13
TENN. CONST. art. XI, § 3 (1953) 27
TENN. CONST. art. XI, § 18 (2006) 14

OTHER AUTHORITIES

Bill Dunn, *Protection or Discrimination? Vote Yes*, KNOXVILLE NEWS-SENTINEL (Aug. 20, 2006)..... 14

Blackwell Compares Gay Couples, Farm Animals, TOLEDO NEWS NOW (Oct. 20, 2004), http://www.toledonewsnow.com/story/2457596/blackwell-compares-gay-couples-farm-animals..... 8

Blake Ellis, *More Than Half of Gay, Lesbian Employees Still Closeted at Work*, CNN MONEY (May 9, 2014), http://money.cnn.com/2014/05/09/pf/gay-lesbian-closeted..... 36

Brief for Pet'rs, Bourke v. Beshear, No. 14-574 (Feb. 27, 2015) 11, 22, 26

Brief for Pet'rs, Obergefell v. Hodges, No. 14-556 (Feb. 27, 2015) 6

Brief for Pet'rs, Tanco v. Haslam, No. 14-562 (Feb. 27, 2015) 13, 27

Brief for Am. Family Ass'n of Michigan as *Amicus Curiae*, Nat'l Pride at Work v. Governor of Mich., No. 133554 (Mich. Oct. 4, 2007) 10

Brief for Org. of American Historians and American Studies Ass'n as *Amici Curiae* in Support of Respondent, United States v. Windsor, No. 12-307 (Feb. 28, 2013) 27

Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) 36, 37

Comparison of Statewide Initiative Processes, Initiative & Referendum Institute at the Univ. of Southern California, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf 26

Constitutional Amendment Procedure: By the Legislature, Council of State Governments, http://knowledgecenter.csg.org/kc/system/files/1.2%202014.pdf 26

Defense of Marriage Act, Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 74-75 (1996) (statement of Rep. Whyman), http://bulk.resource.org/gpo.gov/hearings/104h/25728.pdf 10

Daniel Reynolds, *John Boehner: 'No Way' ENDA Will Pass This Year*, THE ADVOCATE (Jan. 30, 2014), http://www.advocate.com/politics/politicians/2014/01/30/john-boehner-no-way-enda-will-pass-year 39

David Ferguson, *Cincinnati School Hires Gay Teacher, Then Fires Him for Being Gay*, RAW STORY (June 6, 2012), http://www.rawstory.com/rs/2012/06/cincinnati-school-hires-gay-teacher-then-fires-him-for-being-gay 32

Derek Davis, NEW RELIGIOUS MOVEMENTS AND RELIGIOUS LIBERTY IN AMERICA (2003) 22

Doctor Refuses Treatment of Same-Sex Couple's Baby, FOX NEWS DETROIT (Feb. 18, 2015), http://www.myfoxdetroit.com/story/28142401/doctor-refuses-treatment-of-same-sex-couples-baby 32

Domestic Partner Ballot Initiative, Citizens for Government Accountability and Transparency, http://www.cgatpac.com/domestic-partner-ballot-initiative 43

Ed O'Keefe & Craig Whitlock, *Pentagon Worried Congress Won't End 'Don't Ask, Don't Tell,'* WASH. POST (Dec. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/02/AR2010120204635.html 34

Election 2004 – Ballot Measures, CNN, http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures 9, 11, 13

Election 2006 – Ballot Measures, CNN, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures 14

Employment Non-Discrimination Act: Legislative Timeline, Human Rights Campaign, http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline 39

Ely Portillo & Mark Price, *Charlotte LGBT Ordinance Fails 6-5 in Contentious Meeting*, CHARLOTTE OBSERVER (Mar. 2, 2015), http://www.charlotteobserver.com/news/local/article11908907.html 40

THE FEDERALIST No. 10 (James Madison) 15

THE FEDERALIST No. 51 (James Madison) 16

THE FEDERALIST No. 78 (Alexander Hamilton) 16, 17, 18

Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, Williams Institute (Apr. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf 30

Heather Mason Kiefer, *Gays in Military: Public Says Go Ahead and Tell*, Gallup (Dec. 21, 2004), http://www.gallup.com/poll/14419/Gays-Military-Public-Says-Ahead-Tell.aspx 34

Herman Wang & Edward L. Pitts, *State Lawmakers Say Marriage Amendment Should Be up to Voters*, CHATTANOOGA TIMES (June 8, 2006) 14

Interview with Gary Glenn, "Off the Record," WKAR (Jan. 16, 2004), http://archive.wkar.org/offtherecord/..... 10

James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), http://www.constitution.org/jm/18291202_vaconcon.txt..... 15

Janet Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) 24, 29, 37, 38

Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, WASH. POST (Feb. 23, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it 41

John Hart Ely, DEMOCRACY AND DISTRUST (1980) 24

John M. Becker, *Chattanooga Equal Benefits Ordinance Goes Down in Flames*, THE BILERICO PROJECT (Aug. 8, 2014), http://www.bilerico.com/2014/08/Chattanooga_equal_benefits_ordinance_goes_down_in_.php ... 43

Jonathan Oosting, *'Historic' Gay Rights Hearing Ends Without Vote on Michigan Anti-Discrimination Proposals*, MLIVE (Dec. 4, 2014), http://www.mlive.com/lansing-news/index.ssf/2014/12/historic_hearing_on_gay_rights.html 42

Kansas: Governor Rescinds Order Protecting Gay State Workers, N.Y. TIMES (Feb. 10, 2015), http://www.nytimes.com/2015/02/11/us/kansas-governor-rescinds-order-protecting-gay-state-workers.html 41

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) 36, 37

Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals*, 29 PS: POLITICAL SCIENCE AND POLITICS (1996)31, 35

Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001) 23

Kyle Feldscher, *Woman Married During Repeal of Michigan's Gay Marriage Ban Assaulted and Called Gay Slur*, MLIVE (Apr. 1, 2014), http://www.mlive.com/news/ann-arbor/index.ssf/2014/04/woman_married_during_repeal_of.html 32

Laura Conaway, *Mississippi Town Repeals Anti-Discrimination Resolution in Secret*, MSNBC (Jan. 8, 2015), http://www.msnbc.com/rachel-maddow-show/mississippi-town-repeals-anti-discrimination-resolution-secret 32

LGBT Housing Discrimination, U.S. Dep't of Housing and Urban Development, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination 40

Marc Ambinder, *Bush Campaign Chief and Former RNC Chair Ken Mehlman: I'm Gay*, THE ATLANTIC (Aug. 25, 2010), http://www.theatlantic.com/politics/archive/2010/08/bush-campaign-chief-and-former-rnc-chair-ken-mehlman-im-gay/62065 6

Margaret Bichler, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167 (2008) 38

Michael Klarman, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2014) 6

Michael Rogers, *Why I Outed Gay Republicans*, POLITICO (June 26, 2014), http://www.politico.com/magazine/story/ 2014/06/mike-rogers-outed-gay-republicans-108368.html 37

Non-Discrimination Laws: State-by-State Information - Map, ACLU, http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map 39

Peter Irons, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999) 21

Public Pool in Galion Denies Family Pass to Same-Sex Couple, OUTLOOK OHIO (July 9, 2014), http://outlookcolumbus.com/2014/07/public-pool-in-galion-denies-family-pass-to-same-sex-couple/ 33

Rebecca Ferrar, *Homosexual Marriage Ban Cleared by Panel*, KNOXVILLE NEWS-SENTINEL (Feb. 21, 1996) 13

Religion Drives Peach, MEMPHIS COMMERCIAL APPEAL (Apr. 16, 1996) 13

REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW, Michigan Department of Civil Rights (Jan. 28, 2013), http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf 32

Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008) 21, 22, 23

Ryan Gorman, *Outrage as Michigan Republican Claims 'Gays Want Free Medical Insurance Because They're Dying of AIDS,'* DAILY MAIL (Dec. 10, 2013), http://www.dailymail.co.uk/news/article-2521620/Michigan-Republican-Dave-Agema-says-gays-want-free-medical-insurance-AIDS.html 32

Same-Sex Marriage Laws, National Conference of State Legislatures (Feb. 9, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx 34

Sen. McGaha on Anti-Gay SB245, YOUTUBE (Feb. 20, 2009), http://www.youtube.comwatch?v=iTpE0Gh7X4w 12

Sen. Tapp on Anti-Gay SB245, YOUTUBE (Feb. 20, 2009), http://www.youtube.com/watch?v=DO7i0O9N0Ac 12

Seth Stephens-Davidowitz, *How Many American Men Are Gay?*, N.Y. TIMES (Dec. 7, 2013), http://www.nytimes.com/2013/12/08/opinion/sunday/how-many-american-men-are-gay.html 36, 38

SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN: A REPORT OF MICHIGAN'S FAIR HOUSING CENTERS (Jan. 2007), http://www.fhcmichigan.org/images/Arcus_web1.pdf 32

State Issue 1: Argument In Support Of, Ohio Secretary of State, http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102Issue1/State%20Issue%201%20Argument%20in%20Support%20of.aspx 7

Steve Sanders, *Mini DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE (2014) 25, 26, 27, 28

Sunnivie Brydum, *Duggars Declare Victory for 'Equality' in Repealing Nondiscrimination Ordinance*, THE ADVOCATE (Dec. 10, 2014), http://www.advocate.com/politics/2014/12/10/duggars-declare-victory-fairness-repealing-nondiscrimination-ordinance 42

Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992) 23

Tennessee Constitutional History, Harry Phillips American Inn of Court, http://harryphillipsaic.com/wp-content/uploads/2013/02/1_TNConstitutionHistory.pdf 27

Thomas Jefferson First Inaugural Address (1801), http://millercenter.org/president/jefferson/speeches/speech-3469 16

WRITINGS OF JAMES MADISON (G. Hunt ed. 1904) 16

Zane McMillin, *'Filthy Homosexuals': Michigan GOP Leader Dave Agema's Facebook Post Sparks Furor*, MLIVE (Mar. 28, 2013), http://www.mlive.com/news/grand-rapids/index.ssf/2013/03/furor_grows_over_michigan_repu.html 31

INTEREST OF *AMICI CURIAE*

Amici Elected Officials and Former Officeholders of Michigan, Ohio, Kentucky, and Tennessee, and the Michigan and Ohio Democratic Parties, file this brief in support of Petitioners in these consolidated cases.[1]

The 156 individual *amici* are sitting elected officials and former holders of public office at the federal, state, county, and city levels. They hail from all four states of the Sixth Circuit. They include members of Congress, a former governor, a former state attorney general, state legislators, mayors, city councilmembers, county clerks and commissioners, and state university trustees, among others. They are joined by the Michigan and Ohio Democratic Parties, which are recognized by their respective states as official political parties with the right to nominate candidates for election to public office.

Collectively, *amici*'s constituents and members include millions of Michiganders, Ohioans, Kentuckians, and Tennesseans, both gay and straight. Many are barred from marrying the person they love, or from having their lawful out-of-state marriages recognized, by

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from Respondents consenting to the filing of *amicus curiae* briefs in support of either party or of neither party have been filed with the Clerk of the Court. *Amici* have received written consent to the filing of this brief from each Petitioner.

the laws challenged in these cases. *Amici* have an interest in seeing that discrimination brought to an end.

As elected officials, former officeholders, and political organizations, *amici* recognize and cherish our Nation's tradition of popular sovereignty. We are deeply committed to democracy and, indeed, have often litigated in the state and federal courts to protect individuals' right to participate in the political process. At the same time, our first-hand and daily experience with democracy gives us a clear understanding of its limitations—foremost, safeguarding the rights of disfavored minority groups against the transient preferences of the majority.

Amici hasten to note that the issues in these cases transcend partisan politics and do not divide along party lines. At times in our history, both Democrats and Republicans, and their political parties, have perpetuated anti-gay discrimination and sought to use anti-gay animus for political advantage. Governors from both parties are defending the marriage bans now before the Court. On the other hand, many Democrats and Republicans have come to realize the fundamental unfairness of discrimination based on sexual orientation.

Amici believe that the Sixth Circuit erred by elevating one important American value—democratic self-government—over our Constitution's bedrock guarantees of liberty and equality. We join in asking this Court to reverse its judgment.

SUMMARY OF ARGUMENT

> The very purpose of [our Constitution] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts....[These] rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 638 (1943).

* * *

The Sixth Circuit majority framed the central question in these cases as "how best to handle" the rectification of a conceded injustice. *DeBoer* v. *Snyder*, 772 F.3d 388, 395 (6th Cir. 2014). It accepted that "marriage laws *should* be extended to gay couples," and acknowledged that the challenged marriage bans cause "profound" "harms," both to "gay couples" and to "their children." *Id.* at 405, 407-08 (emphasis added). Yet the Sixth Circuit held that the marriage bans—"no matter how unfair, unjust, or unwise" they are—must be abolished (if at all) through "the democratic processes." *Id.* at 404.

The panel majority relied on a passage from *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (plurality op.), lauding our nation's demo-

cratic traditions. *Schuette* observed that the democratic process is how ordinary Americans "seek a voice in shaping the destiny of their own times," *id.* at 1636 (quoting *Bond* v. *United States*, 133 S. Ct. 2355, 2364 (2011)), and that even "difficult question[s] of public policy" are properly subject to political resolution, *id.* at 1637. Few believe this more strongly than *amici*, and few have worked more tirelessly—in state houses, in the courts, and in the streets—to ensure that people have a voice in the political process.

But *Schuette* also recognized that democracy is "not inconsistent with the well-established principle that when hurt or injury is inflicted on [disfavored] minorities" by the governing majority, "the Constitution requires redress by the courts." *Ibid.* In fact, "[s]earching judicial review" is "necessary" to "guard against invidious discrimination"—even where that discrimination is imposed through popular vote. *Ibid.* (quoting *Johnson* v. *California*, 543 U.S. 499, 511-12 (2005)).

As *amici* explain below, the Framers' writings and this Court's decisions both recognize that the basic rights and equal citizenship of minority groups do not exist at the sufferance of the body politic.

Moreover, as *amici* discuss, the confluence of factors present in these cases makes Petitioners' injuries particularly ill-suited to redress through democratic channels. First, the challenged laws are constitutional

amendments, which makes them unusually difficult to reverse through democratic action—indeed, that was the very point of enacting them. And second, these laws target a minority that has suffered a long history of invidious discrimination and that has limited power to effect democratic change. These circumstances cry out for a judicial remedy.

STATEMENT OF FACTS

As elected officials, former officeholders, and political parties within the Sixth Circuit, *amici* lived firsthand the stories behind the marriage bans that Petitioners challenge here. Those stories—which are replete with demagoguery and blatant displays of animus—are recounted briefly below.

As a threshold matter, it is no accident that all four states in the Sixth Circuit (along with many others) wrote same-sex-marriage prohibitions into their constitutions in the same two-year period (Michigan, Ohio, and Kentucky in 2004; Tennessee in 2006). They were part of a cynical electoral strategy by national political operatives to foment and harness backlash to the Massachusetts Supreme Judicial Court's decision in *Goodridge* v. *Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (concluding that denial of marriage to same-sex couples violated state constitution).

In other words, these were not spontaneous exercises of democratic self-determination, as depicted by the

Sixth Circuit. Rather, they were part of a calculated attempt to inflame the American people and injure gays and lesbians for political gain. This is not merely *amici*'s view; those responsible have admitted as much and apologized for their actions. *See* Marc Ambinder, *Bush Campaign Chief and Former RNC Chair Ken Mehlman: I'm Gay*, THE ATLANTIC (Aug. 25, 2010), http://www.theatlantic.com/politics/archive/2010/08/bush-campaign-chief-and-former-rnc-chair-ken-mehlman-im-gay/62065;[2] Michael Klarman, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 105-06 (2014).

A. Ohio

For two centuries, nothing in Ohio's positive law addressed whether same-sex couples could marry. Brief for Pet'rs at 4, Obergefell v. Hodges, No. 14-556 (Feb. 27, 2015); *see Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 974 (S.D. Ohio 2013), *rev'd sub nom. DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014). Then, in 2004, the Ohio Revised Code was amended to provide that "[a] marriage may only be entered into by one man and one woman" and that "[a]ny marriage between persons of the same sex is against the strong public policy of this state." OHIO REV. CODE § 3101.01(A), (C)(1). The legislature did not stop there: it also provided that "[t]he

[2] All Internet links visited March 1, 2015.

recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex" is "against the strong public policy of this state," and that "[a]ny public act, record, or judicial proceeding of this state...that extends the specific statutory benefits of legal marriage" to same-sex couples "is void ab initio." *Id.* § 3101.01(C)(3).

That same year, voters adopted the Marriage Protection Amendment, which altered the Ohio constitution to provide that "[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state," and that Ohio "and its political subdivisions shall not create or recognize a legal status...that intends to approximate the design, qualities, significance or effect of marriage." OHIO CONST. art. XV, § 11 (2004).

The official ballot explanation, written by the "Ohio Campaign to Protect Marriage" and placed before Ohio voters, described the measure as "restrict[ing] governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage." *State Issue 1: Argument In Support Of*, Ohio Secretary of State, http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102Issue1/State%20Issue%201%20Argument%20in%20Support%20of.aspx.

Governor Robert Taft said of these enactments: "At a time when parents and families are under constant attack within our social culture, it is important to confirm and protect those environments that offer our children, and ultimately our society, the best opportunity to thrive." *Obergefell*, 962 F. Supp. 2d at 975.

One of the amendment's principal supporters, a group called Citizens for Community Values, warned voters of the "inherent dangers of the homosexual activists' agenda," and issued misleading campaign publications stating that same-sex-marriage advocates "sought to eliminate age requirements for marriage, advocated polygamy, and sought elimination of kinship limitations so that incestuous marriages could occur." *Ibid.* This same group "warned Ohio employers that '[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span.'" *Ibid.*

Ohio's Secretary of State, Ken Blackwell, joined by megachurch pastor Rod Parsley, "travel[ed] across the state trying to rally support for" the ballot measure. *Blackwell Compares Gay Couples, Farm Animals*, TOLEDO NEWS NOW (Oct. 20, 2004), http://www.toledonewsnow.com/story/2457596/blackwell-compares-gay-couples-farm-animals. Just days before the election, Secretary Blackwell told "an energized crowed at the Cathedral of

Praise" in Sylvania, Ohio that it was "time for people of God to take a stand." Of same-sex marriage, he said: "I don't know how many of you have a farming background but I can tell you right now that notion even defies barnyard logic....[T]he barnyard knows better." *Ibid.*

The Ohio amendment passed by a margin of 62% to 38%. *See Election 2004 – Ballot Measures*, CNN, http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures.

B. Michigan

Nothing in Michigan positive law addressed same-sex marriage until 1996. In that year, in response to the Hawaii Supreme Court's suggestion that same-sex marriage might be required by its state constitution, *see Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993), the Michigan legislature enacted a statute defining marriage as "inherently a unique relationship between a man and a woman." MICH. COMP. LAWS § 551.1. The statute's text justified this definition as necessary to "protect[]" marriage and "promote...the stability and welfare of society and its children." *Ibid.* At the same time, the legislature amended Michigan law to deny recognition of out-of-state marriages between individuals of the same sex. MICH. COMP. LAWS § 551.272.

The primary sponsor of the latter bill was Michigan Representative Deborah Whyman. At that time, Repre-

sentative Whyman was also lobbying Congress to pass the federal Defense of Marriage Act ("DOMA"), which it went on to do the same year. In her testimony, Whyman referred to same-sex marriage as "disgust[ing]," "madness," and "bizarre social experimentation." *Defense of Marriage Act, Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 74-75 (1996) (statement of Rep. Whyman), http://bulk.resource.org/gpo.gov/hearings/104h/25728.pdf.

Eight years later, in 2004, Michigan voters approved the Michigan Marriage Amendment, which placed the following language in the state constitution: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25 (2004).

One of the primary forces behind passage of the amendment was the American Family Association of Michigan. Its president (now state representative), Gary Glenn, was a principal author of the proposal and one of its most outspoken advocates. *See* Brief for Am. Family Ass'n of Michigan as *Amicus Curiae* at 1, Nat'l Pride at Work v. Governor of Mich., No. 133554 (Mich. Oct. 4, 2007). Glenn warned voters that "[i]f the state government...gives its approval to so-called homosexual mar-

riage, you'll have more children who are led to believe that is an acceptable lifestyle, [and] they might engage in experimentation." Interview with Gary Glenn, "Off the Record," WKAR (Jan. 16, 2004) at 16:30-16:44, http://archive.wkar.org/offtherecord/.

The Michigan amendment passed by a margin of 59% to 41%. *See Election 2004 – Ballot Measures*, *supra*.

C. Kentucky

For 206 years, nothing in Kentucky positive law addressed whether same-sex couples could marry. Brief for Pet'rs at 4, Bourke v. Beshear, No. 14-574 (Feb. 27, 2015). Then, in 1998, two years after Congress passed DOMA, the Kentucky legislature prohibited same-sex marriages and declared them "against Kentucky public policy." *Id.* at 4-5; *see* KY. REV. STAT. §§ 402.005, 402.020, 402.040, 402.045; *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 545 & n.3 (W.D. Ky.), *rev'd sub nom. DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014).

Six years later, in 2004, the Kentucky legislature placed Constitutional Amendment 1 on the November presidential election ballot. It provided that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky," and that any "legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." KY. CONST. § 233A (2004).

The amendment's sponsor in the legislature, Senator Vernie McGaha, said on the Senate floor:

> Marriage is a divine institution....[T]he scriptures make it the most sacred relationship of life....[I]n First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, "Let every man have his own wife, and let every woman have her own husband."....
>
> [T]his institution of marriage is under attack by judges and elected officials....We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values....Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: the sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.

Bourke, 996 F. Supp. 2d at 550 n.15; *see Sen. McGaha on Anti-Gay SB245*, YOUTUBE (Feb. 20, 2009), http://www.youtube.com/watch?v=iTpE0Gh7X4w. A co-sponsor, Senator Gary Tapp, stated that "[w]hen the citizens of Kentucky accept this amendment, no one, no judge, no

mayor, no county clerk, will be able to question their beliefs in the traditions of stable marriages and strong families." *Bourke*, 996 F. Supp. 2d at 550 n.15; *see Sen. Tapp on Anti-Gay SB245*, YOUTUBE (Feb. 20, 2009), http://www.youtube.com/watch?v=DO7i0O9N0Ac.

Voters approved the amendment by a margin of 75% to 25%. *See Election 2004 – Ballot Measures*, *supra*.

D. Tennessee

For two centuries, nothing in Tennessee positive law addressed same-sex marriage. *See* Brief for Pet'rs at 6-7, Tanco v. Haslam, No. 14-562 (Feb. 27, 2015). Then, in 1996—the same year Congress passed DOMA—Tennessee's legislature enacted a statute deeming it "the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state." TENN. CODE. ANN. § 36-3-113.

In a committee hearing on the bill, its primary sponsor, Senator Jim Holcomb, called homosexuality an "aberrant lifestyle." Rebecca Ferrar, *Homosexual Marriage Ban Cleared by Panel*, KNOXVILLE NEWS-SENTINEL (Feb. 21, 1996) at A3. In the state House of Representatives, one of the bill's most ardent supporters, Rep. James Peach, spoke in favor of it: "Homosexuality is blasphemous in the eyes of the Lord. The only thing it can sat-

isfy is the lust for radical sex." *Religion Drives Peach*, MEMPHIS COMMERCIAL APPEAL (Apr. 16, 1996), at A4.

A decade later, in 2006, the Marriage Protection Amendment was placed before Tennessee voters. It provided that "the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state" and expressly denied recognition of same-sex marriages performed out-of-state. TENN. CONST. art. XI, § 18 (2006). One state representative commented at a news conference supporting the proposed amendment: "[I]t'll be a sad day when queers and lesbians are allowed to get married...and kiss in front of the courthouse." Herman Wang & Edward L. Pitts, *State Lawmakers Say Marriage Amendment Should Be up to Voters*, CHATTANOOGA TIMES (June 8, 2006). A member of the Tennessee House leadership, Representative Bill Dunn, wrote an editorial favoring the amendment that quoted Scripture and deemed same-sex marriage "a lie." Bill Dunn, *Protection or Discrimination? Vote Yes*, KNOXVILLE NEWS-SENTINEL (Aug. 20, 2006), at 63.

The Tennessee amendment passed by a margin of 81% to 19%—the second widest margin of any anti-same-sex-marriage amendment in any state. *See Election 2006 – Ballot Measures*, CNN, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures.

ARGUMENT

I. UNDER OUR CONSTITUTIONAL SYSTEM, THE BASIC RIGHTS AND EQUAL CITIZENSHIP OF MINORITY GROUPS ARE NOT SUBJECT TO THE POLITICAL PROCESS.

Contrary to the Sixth Circuit's view, our constitutional tradition is *preserved*, not *undermined*, by "[s]earching judicial review" of laws that inflict "hurt or injury" on disfavored minorities. *Schuette*, 134 S. Ct. at 1637. As *amici* explain below, the Framers of our Constitution expressly intended the federal courts to play this role, and some of this Court's proudest hours have been when it fulfilled that duty.

A. The Framers Intended Vigorous Judicial Review Where Minority Rights Are Abridged By Popular Vote.

Our founding fathers were not devotees of untempered majority rule. They well "recogniz[ed] the occasional tyrannies of governing majorities." *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). In fact, the Founders knew that "popular government" could enable a majority "to sacrifice to its ruling passion or interest...the rights of other citizens." THE FEDERALIST No. 10 (James Madison); *see also* James Madison, Speech in the Virginia Constitutional Conven-

tion (Dec. 2, 1829) ("In republics, the great danger is, that the majority may not sufficiently respect the rights of the minority."), http://www.constitution.org/jm/18291202_vaconcon.txt.

The Founders did not simply accept this as a necessary evil. To the contrary, recognizing "that certain values are more important than the will of a transient majority," *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 781-82 (1986) (Stevens, J., concurring), they deemed it "of great importance...to guard one part of the society against the injustice of the other part," THE FEDERALIST No. 51 (James Madison). As Thomas Jefferson observed, "the will of the majority...to be rightful must be reasonable; [and] the minority possess their equal rights, which equal law must protect, and to violate [which] would be oppression." First Inaugural Address (1801), http://millercenter.org/president/jefferson/speeches/speech-3469.

Accordingly, the Framers took pains to place checks on the excesses of popular will. Most relevant here, they "crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims." *DeBoer*, 772 F.3d at 436 (Daughtrey, J., dissenting). The Framers expressly intended an "independent" federal judiciary to act as a "bulwark[]" against majority oppression. THE FEDERALIST No. 78 (Alexander Hamilton); *see also* 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed. 1904) ("[If] they are incorporated into the Con-

stitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of [Americans'] rights; they will be an impenetrable bulwark against every assumption of power....").

"[T]he firmness of the judicial magistracy," the Framers noted, would be "of vast importance in mitigating the severity and confining the operation" of "unjust and partial laws" that "injur[e]...the private rights of particular classes of citizens." THE FEDERALIST, No. 78, *supra*. Alexander Hamilton explained:

> [I]ndependence of the judges is...requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which...sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion...serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never...question[] th[e] fundamental principle of republican government,...it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing

> Constitution, would, on that account, be justifiable in a violation of those provisions.

Ibid.

The Framers foresaw that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." *Ibid.* The Sixth Circuit failed to show that fortitude here.

B. This Court Has Rejected Deference To The Democratic Process Where Laws Target Disfavored Minority Groups.

Consistent with the Framers' intention, this Court has recognized that the federal courts are "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940). This Court has rebuffed the notion—accepted by the Sixth Circuit—that such victims of discrimination are "better off" seeking relief through democratic means:

> *[W]e find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of [the] asserted rights*....[I]ndividual constitutional rights cannot be deprived, or denied judicial effec-

> tuation, because of the existence of a non-judicial remedy through which relief...might be achieved....A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.

Lucas v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964) (emphasis added).

Of course, this Court has not always lived up to these principles. But when it has not, those errors have not withstood the test of time. *Compare Bowers* v. *Hardwick*, 478 U.S. 186, 190 (1986) ("Th[is] case...calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."), *with Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today."). Perhaps nothing exhibits this more starkly than the pair of "flag salute" cases this Court decided in a three-year span in the 1940s: *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

In 1935, ten-year-old William Gobitis and twelve-year-old Lillian Gobitis "were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag." *Gobitis*, 310 U.S. at 591. As Jehovah's Witnesses, they were raised to believe that saluting a secular symbol was prohibited by Scripture. *Id.*

at 591-92. Their father sued on their behalf, and the lower courts ruled in their favor.

This Court reversed, in an opinion that reads like a roadmap for the Sixth Circuit's opinion below. The *Gobitis* Court viewed the central question presented not as whether the rights of the Gobitis children were violated, but as "whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining [for themselves] the appropriateness" of flag-saluting requirements. *Id.* at 598. The Court held that the body politic has "the right to select appropriate means" for fostering patriotism, and declined to "stigmatize [the] legislative judgment" of the Minersville school board, or to "put[] the widely prevalent belief[s]" of the public "beyond the pale of legislative power." *Id.* at 595, 597-98.

Just as the Sixth Circuit believed that it would be "[b]etter" for Petitioners to invoke the "customary political processes" because this would permit "the people" to "become the heroes of their own stories," *DeBoer*, 772 F.3d at 421, the *Gobitis* Court believed that a democratic remedy would be superior to a judicial one because it would "vindicate the [people's] self-confidence":

> [P]ersonal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's hab-

> its and not enforced against popular policy by the coercion of adjudicated law.
>
> * * *
>
> [E]ducation in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Id. at 599-600 (citation omitted).

Chief Justice Stone dissented. Like Judge Daughtrey below, he was "not persuaded that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.'" *Id.* at 605-06. "This seem[ed] to [him] no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will." *Id.* at 606.

"[F]ew" rulings of this Court "have ever provoked as violent a reaction as the *Gobitis* decision." Peter Irons, A PEOPLE'S HISTORY OF THE SUPREME COURT 341 (1999). In its wake, and emboldened by the Court's denial of constitutional protection for their rights, "vigilantes in nearly every state of the Union brutalized hundreds" of

Jehovah's Witnesses. Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 373 (2008) (citation omitted); *see also* Derek Davis, NEW RELIGIOUS MOVEMENTS AND RELIGIOUS LIBERTY IN AMERICA, 177-78 (2003). "The strength of the link between the violence and [the *Gobitis*] opinion is dramatically illustrated by a sheriff's explanation of why a mob chased seven Witnesses from a small Southern town. He explained, 'They're traitors—the Supreme Court says so. Ain't you heard?'" *Ibid.* (quoting Beulah Amidon, *Can We Afford Martyrs?*, SURVEY GRAPHIC (Sept. 1940) at 457).[3]

Just three years later, in *Barnette*, the Court expressly overruled *Gobitis* and "eviscerat[ed]" its reasoning. Tsai, *supra*, at 365. In a direct response to *Gobitis*' "democratic process" passage, the Court wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.... [F]undamental rights may not be submit-

---

[3] *Cf.* Brief for Pet'rs at 45, Bourke, No. 14-574 (noting that the Court's opinion in *Bowers* v. *Hardwick* similarly "facilitated a sharp rise in anti-gay rhetoric and violence more generally").

> ted to vote; they depend on the outcome of no elections.

319 U.S. at 638. As the *Barnette* Court saw it, "history authenticates" that "the function of this Court" is to act "when liberty is infringed" by majority vote. *Id.* at 640.

Today, *Gobitis* is "widely regarded as shameful," Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 716-17 (1992), and "a low point" in this Court's history, Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 500 (2001). *Barnette*, on the other hand, is seen as an exemplar of the Court "'r[ising] to its full height as champion of the lowly' against an enflamed populace." Tsai, *supra*, at 373 (quoting Arthur Krock, "The Supreme Court at its Peak," N.Y. TIMES (June 15, 1943) at 20).

Amici believe that future generations would view a decision affirming the Sixth Circuit just as *Gobitis* is viewed today: an abdication of the Court's duty to provide "redress" when "hurt or injury is inflicted on [unpopular] minorities by the encouragement or command" of an overbearing majority. *Schuette*, 134 S. Ct. at 1637. *Amici* urge the Court not to repeat this mistake.

II. PETITIONERS' CLAIMS ARE ESPECIALLY ILL-SUITED FOR RESOLUTION THROUGH THE POLITICAL PROCESS.

Judicial deference to "the majoritarian process" should be at its ebb where that process itself has been "poisoned." Janet Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 916 (1989). As John Hart Ely observed, this poisoning of the democratic process can happen in two ways:

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or
>
> (2) though no one is actually denied a voice or a vote,...an effective majority [is] systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest....

John Hart Ely, DEMOCRACY AND DISTRUST 103 (1980); *see also United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Both types of democratic malfunction are evident here. *First*, the "ins" made strategic and extraordinary use of the amendment process to engrave discrimination *in the very constitutions* of the states of the Sixth Cir-

cuit, thus "choking off" the ordinary "channels of political change." And *second*, gays and lesbians are a minority that is "systematically disadvantag[ed]" in the democratic process.

A. By Amending The States' Constitutions, These Laws Intentionally Made Democratic Change Impracticable.

In deciding how much deference to afford the challenged marriage bans, the Court should bear in mind that they are enshrined in *constitutional amendments*—a fact that the Sixth Circuit entirely disregarded.

The courts' usual deference to the democratic process "assumes a political process that is responsive to evolving public attitudes and where simple legislative majorities can prevail under ordinary lawmaking." Steve Sanders, *Mini DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 16 (2014). On the other hand, this Court has long recognized that "more exacting judicial scrutiny" may be required of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Carolene Prods.*, 304 U.S. at 152 n.4; *see, e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 629-33 (1996) (striking down a state referendum that required Colorado gays and lesbians to "enlist[] the citizenry of Colorado to amend the state constitution" in or-

der to obtain legal protections); *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467-68 (1982); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969).

State constitutions "typically are far more difficult to change than ordinary statutes." Sanders, *supra*, at 14. Because of these onerous requirements, policies enshrined by amendment are "very difficult to revisit even after public attitudes become more favorable[.]" *Id.* at 18; *see* Brief for Pet'rs at 41 n.9, Bourke, No. 14-574 (noting that "[t]here has only been one instance in Kentucky history when an amendment to the state constitution...has been repealed: the 1919 amendment establishing prohibition").

For example, in 32 states, including Kentucky and Tennessee, the people cannot amend the constitution by initiative. *See Comparison of Statewide Initiative Processes*, Initiative & Referendum Institute at the Univ. of Southern California, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf. States that do permit initiative amendments generally impose onerous and costly signature-collection requirements, and some limit how often a question may be voted on. *See Constitutional Amendment Procedure: By the Legislature*, Council of State Governments, http://knowledgecenter.csg.org/kc/system/files/1.2%202014.pdf. And in 27 states, constitutional

amendments require *supermajority* legislative approval, sometimes across multiple legislative sessions. *Ibid.*

Consider Tennessee: to amend its constitution, a majority of both legislative chambers must approve the proposed amendment on each of three separate readings. Then, during the session of the legislature that meets after the next legislative election, *two-thirds* of each chamber must approve the amendment on three separate readings. Finally, at the subsequent gubernatorial election, a majority of all citizens of the state voting for governor must vote for the amendment. TENN. CONST. art. XI, § 3 (1953); Brief for Pet'rs at 54, Tanco, No. 14-562.[4]

By placing marriage bans *in state constitutions*, "proponents intended to freeze marriage discrimination in place and put it beyond the reach of ordinary democratic deliberation." Sanders, *supra*, at 14; *see* Brief for Org. of American Historians and American Studies Ass'n as *Amici Curiae* in Support of Respondent at 34-35, United States v. Windsor, No. 12-307 (Feb. 28, 2013) ("These

---

[4] The Tennessee constitution may also be amended by constitutional convention, but this has happened only a handful of times in state history, and not at all since 1977. *See Tennessee Constitutional History*, Harry Phillips American Inn of Court, http://harryphillipsaic.com/wp-content/uploads/2013/02/1_TNConstitutionHistory.pdf. *Cf. DeBoer*, 772 F.3d at 435 n.6 (Daughtrey, J., dissenting) (noting that in Michigan, a constitutional convention "can be called no more often than every 16 years" (citing MICH. CONST. art. XII, § 3)).

state constitutional amendments serve as a firewall against changes in public opinion; [they] make it very difficult for gay couples to obtain the right to marry even if public opinion continues to shift in their favor."). This is exemplified by a candid comment from one Indiana state legislator, who urged prompt enactment of a state constitutional ban before "the culture changes and [popular support for same-sex marriage] grow[s]." Sanders, *supra*, at 20 n.46 (quoting Michael Auslen, *HJR 3 Debate Over for Now*, IND. DAILY STUDENT (Feb. 18, 2014)).

There is a common misconception—shared by the Sixth Circuit majority—that these constitutional amendments were merely intended to "overrule...or preempt" *judicial* decisions regarding marriage. *See DeBoer*, 772 F.3d at 408-09. This is incorrect. The chief sponsor of Kentucky's marriage amendment urged passage so that "*no legislature*...will be able to change" the exclusion of same-sex couples. *Ante* at 12. The Speaker of Arizona's House of Representatives urged "putting [a same-sex marriage ban] in the [Arizona] Constitution so that it withstands any future legal *or legislative* challenges." Sanders, *supra*, at 20 (emphasis added). And a Georgia newspaper editorial advocated for that state's constitutional ban to "put the institution [of marriage] back where it belongs, above *both* the courts and the *Legislature*." *Ibid.* (emphasis added).

Frustrating the ordinary democratic process, in other words, was the very purpose of the challenged amend-

ments. This highly unusual—indeed, largely unprecedented—campaign to freeze discrimination permanently into state constitutions across the nation precludes "change through the customary political processes," *DeBoer*, 772 F.3d at 421, and counsels judicial skepticism, not deference.

B. These Laws Target A Small Minority With A History Of Discrimination And Limited Political Power.

"The history of the United States testifies eloquently to the fact that, when a despised minority must fend for itself in the tumult of electoral and legislative politics, the majority may deny it a fair chance." Halley, *supra*, at 916. As political science professor Dr. Gary Segura testified in the "Proposition 8" trial:

> [T]he role of prejudice [in distorting the democratic process] is profound. If [a] group is envisioned as being somehow morally inferior, a threat to children, a threat to freedom,...then the range of compromise is dramatically limited. It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That's just not the basis for compromise and negotiation in the political process.

Perry v. *Schwarzenegger*, 704 F. Supp. 2d 921, 987 (N.D. Cal. 2010), *aff'd sub nom. Perry* v. *Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom. Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013).

This Court, therefore, does not employ the ordinary "presumption of constitutionality" to legislation targeting certain minority groups, because prejudice against such groups "tends seriously to curtail the operation of those political processes ordinarily to be relied upon" to protect a group's interests. *Carolene Prods.*, 304 U.S. at 152 n.4 (1938); *see also San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

Gays and lesbians are, beyond question, a small minority. *See* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender*?, Williams Institute (Apr. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (about 1.7% of the adult U.S. population, with another 1.8% identifying as bisexual). And, as Justice Brennan observed thirty years ago, they have been historically subject to severe prejudice, and are comparatively unable to protect their interests in the political arena. *See Rowland* v. *Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 & n.8 (1985) (Brennan, J., dissenting from denial of certiorari). These circumstances render deference to the democratic process inappropriate, and instead call for searching judicial review. *Ibid.*

1. Gays And Lesbians Have Been Subject To An Extreme History Of Prejudice And Discrimination.

Even the Sixth Circuit majority could not "deny the lamentable reality that gay individuals have experienced prejudice in this country." *DeBoer*, 772 F.3d at 413; *see also Rowland*, 470 U.S. at 1014 ("[H]omosexuals have historically been the object of pernicious and sustained hostility."); *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003) ("[F]or centuries there have been powerful voices to condemn [gays and lesbians] as immoral."). Studies show that "[n]o other group of Americans is the object of such sustained, extreme, and intense distaste." Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals*, 29 PS: POLITICAL SCIENCE AND POLITICS (1996) 469, 470; *see, e.g.*, *Ex Parte H.H.*, 830 So. 2d 21, 26, 35 (Ala. 2002) (Moore, C.J., concurring) (referring to gays as "abhorrent," "detestable," and "an inherent evil" and concurring in denial of custody to lesbian parent).

Sadly, this prejudice is alive and well in *amici*'s states. For example, one prominent politician in Michigan recently posted an article on Facebook calling gays "filthy" and "pedophiles," Zane McMillin, *'Filthy Homosexuals': Michigan GOP Leader Dave Agema's Facebook Post Sparks Furor*, MLIVE (Mar. 28, 2013), http://www.mlive.com/news/grand-rapids/index.ssf/2013/03/furor_grows_over_michigan_repu.html, and publicly opposed same-sex-partner benefits on the ground that gays false-

ly "claim[] AIDS-infected people [as] their spouses so they [can] receive health insurance," Ryan Gorman, *Outrage as Michigan Republican Claims 'Gays Want Free Medical Insurance Because They're Dying of AIDS,'* DAILY MAIL (Dec. 10, 2013), http://www.dailymail.co.uk/news/article-2521620/Michigan-Republican-Dave-Agema-says-gays-want-free-medical-insurance-AIDS.html.

Amici have seen gays and lesbians in their own states subjected to discrimination in a panoply of forms, both in the past and in the present day. *See generally* REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW, Michigan Dep't of Civil Rights 48-49, 61-62, (Jan. 28, 2013), http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf. In just the last few years, this includes anti-gay hate crimes, *see, e.g.*, Kyle Feldscher, *Woman Married During Repeal of Michigan's Gay Marriage Ban Assaulted and Called Gay Slur*, MLIVE (Apr. 1, 2014), http://www.mlive.com/news/ann-arbor/index.ssf/2014/04/woman_married_during_repeal_of.html; denial of medical treatment to gays and their families, *see, e.g.*, *Doctor Refuses Treatment of Same-Sex Couple's Baby*, FOX NEWS DETROIT (Feb. 18, 2015), http://www.myfoxdetroit.com/story/28142401/doctor-refuses-treatment-of-same-sex-couples-baby; denial of housing, *see* SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN: A REPORT OF MICHIGAN'S FAIR HOUSING CENTERS (Jan. 2007), http://www.fhcmichigan.org/images/Arcus_web1.pdf; denial of employment, *see, e.g.*, David Ferguson, *Cincinnati School Hires Gay*

Teacher, Then Fires Him for Being Gay, RAW STORY (June 6, 2012), http://www.rawstory.com/rs/2012/06/cincinnati-school-hires-gay-teacher-then-fires-him-for-being-gay; and denial of public accommodations, *see, e.g.*, *Public Pool in Galion Denies Family Pass to Same-Sex Couple*, OUTLOOK OHIO (July 9, 2014), http://outlookcolumbus.com/2014/07/public-pool-in-galion-denies-family-pass-to-same-sex-couple.

In short, the history of extreme discrimination and prejudice experienced by gays and lesbians, in the Sixth Circuit and elsewhere in this country, can hardly be questioned.

2. Gays And Lesbians Are Comparatively Lacking In Political Power.

The Sixth Circuit's decision minimized the importance of gay and lesbian Americans' minority status and the history of discrimination they have suffered, reasoning that "[t]he Fourteenth Amendment does not" provide heightened protection to "influential, indeed eminently successful, interest groups." *DeBoer*, 772 F.3d at 415. That impression of gay power and influence is severely overstated.[5]

---

[5] Petitioners' merits briefs vividly illustrate that the challenged laws harm not only gays and lesbians, but also their children. The child victims of these laws have *no* political power to seek redress. *Cf. Plyler* v. *Doe*, 457 U.S. 202, 219-20 (1982).

The Sixth Circuit erred right off the bat by citing "the *willingness* of many States" to implement same-sex marriage as evidence of a groundswell of gay political influence. *Id.* at 414 (emphasis added). In reality, only a handful of states that permit same-sex marriage have done so through the ordinary political process. The overwhelming majority—26 of 37—do so only because courts *required* it. *See DeBoer*, 772 F.3d at 435 (Daughtrey, J., dissenting); *Same-Sex Marriage Laws*, National Conference of State Legislatures (Feb. 9, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

The Sixth Circuit similarly erred by citing the repeal of "Don't Ask, Don't Tell" as evidence of gays' and lesbians' power to effect change without judicial assistance. *DeBoer*, 772 F.3d at 415. A majority of the American public opposed "Don't Ask" as early as 1994, and a 63% supermajority desired repeal by 2004. *See* Heather Mason Kiefer, *Gays in Military: Public Says Go Ahead and Tell*, Gallup (Dec. 21, 2004), http://www.gallup.com/poll/14419/Gays-Military-Public-Says-Ahead-Tell.aspx. Yet Congress refused to act until a federal district court held the policy unconstitutional in 2010, and the threat of an injunction loomed. *See Log Cabin Republicans* v. *United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); Ed O'Keefe & Craig Whitlock, *Pentagon Worried Congress Won't End 'Don't Ask, Don't Tell,'* WASH. POST (Dec. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/02/

AR2010120204635.html (*Log Cabin* decision "woke a lot of people up" to the need for legislative action).

Of course, *amici* acknowledge that gays and lesbians have attained *some* political successes. But that is not the point. After all, African-Americans and women have far greater statutory protections and political representation at both the state and federal levels than gays and lesbians—but the Court rightly continues to look with suspicion on race- and sex-based classifications. "The standard is not whether a minority group is *entirely* powerless, but rather whether they suffer from *relative* political weakness." *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 n.7 (N.D. Cal. 2012) (emphasis added).

Gays and lesbians are politically weakened for two reasons that go beyond their extreme small numbers: their relative diffuseness, and their relative invisibility.

First, gays and lesbians are politically "disempowered by virtue of being born as if into a diaspora—probably randomly distributed [throughout] the population at birth." Sherrill, *supra*, at 469. Unlike other minorities, who generally share their minority identities with their families and communities, gays and lesbians are born as minorities *within* their own families and communities. *Ibid.* Ordinarily, they must uproot themselves, and leave their homes and families, if they wish to find one another, form a community, and exercise col-

lective political power. Many gays and lesbians understandably choose not to do so, and remain isolated—and outside of gay political life—for their whole lives. This diffuseness places gays and lesbians at an intrinsic disadvantage in the political process, even when compared to other similarly sized minority groups. *See* Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724-28 (1985) (discussing the various political disadvantages of diffuse minorities).

Second, gay people are disempowered because they are often invisible. "[T]he political powerlessness of gays...cannot be ascertained without taking into account the effects of the closet." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1794-95 (1996). Due to "the immediate and severe opprobrium often manifested against homosexuals once so identified publicly," *Rowland*, 470 U.S. at 1014, many gays and lesbians cannot, or will not, identify as such to the public—and sometimes even to themselves. *See* Blake Ellis, *More Than Half of Gay, Lesbian Employees Still Closeted at Work*, CNN MONEY (May 9, 2014) http://money.cnn.com/2014/05/09/pf/gay-lesbian-closeted (53% of gay employees closeted at work as of last year); Seth Stephens-Davidowitz, *How Many American Men Are Gay?*, N.Y. TIMES (Dec. 7, 2013), http://www.nytimes.com/2013/12/08/opinion/sunday/how-many-american-men-are-gay.html (data showed, as of 2013, that "millions of gay men still live, to some degree, in the closet," and that "[m]ore than

one quarter of gay men hide their sexuality [even] from anonymous surveys").

As Justice Brennan observed, this phenomenon goes to the very heart of gays' and lesbians' "power[] to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014. "[W]hen [people] voluntarily adopt or involuntarily bear the public identity 'homosexual' and for that reason lose their employment and other public benefits, housing, custody of children, resident alien status, medical insurance, and even physical safety, they are hindered and deterred from entering the public debate...." Halley, *supra*, at 918. "A homosexual [political] group," therefore, "must confront an organizational problem that does not arise for its black counterpart: somehow the group must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and bear the private costs this public declaration may involve." Ackerman, *supra*, at 731.

The closet hinders the progress of gay rights in other important ways, as well. For one, closeted gays have often been among the most vociferous *opponents* of gay rights, out of the desire to avoid being discovered, out of self-hatred, or both. *See* Yoshino, *supra*, at 1803; Michael Rogers, *Why I Outed Gay Republicans*, POLITICO (June 26, 2014), http://www.politico.com/magazine/story/2014/06/mike-rogers-outed-gay-republicans-108368.html (naming closeted public officials who actively opposed gay rights). For another, *straight* elected officials have

an incentive to avoid taking pro-gay positions, given that "one's mere participation in political action to [help] gays and lesbians" can prompt suspicions or accusations that one is a closeted homosexual. Halley, *supra*, at 973.

In short, however much political progress gay and lesbian citizens have made to date, their relative diffuseness and invisibility means that they must work twice as hard to achieve half as much. And because the number of gays and lesbians in the closet is "dramatically higher" in states that show less tolerance toward them, Stephens-Davidowitz, *supra*, gay political power is weakest precisely where it is most urgently needed. This structural disadvantage justifies close scrutiny, rather than deference. *See* Margaret Bichler, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167, 170 (2008) ("[T]he unique situation of closeted existence, coupled with...the aims of suspect classification, will reveal a population more suspiciously situated than any this country has ever seen.").

3. Even Today, Gays And Lesbians Are Unable To Protect Themselves From Discrimination Through The Democratic Process.

A central theme of the Sixth Circuit's decision was the notion that society is on the cusp of a new age of acceptance for gays and lesbians, "if the federal courts will

[just] allow that future to take hold." *DeBoer*, 772 F.3d at 415. Again, *amici* do not deny that gays and lesbians have enjoyed some electoral successes in circumscribed regions of the country. But these "are exceptions and not the rule." *Golinski*, 824 F. Supp. 2d at 988. Even today, gays and lesbians are generally unsuccessful at defending or advancing their rights through the political process. The Sixth Circuit's rosy view was unwarranted.

For example, the Employment Non-Discrimination Act (ENDA), which would add sexual orientation as a protected category under federal non-discrimination laws, has been introduced in Congress ten times since 1994. *Employment Non-Discrimination Act: Legislative Timeline*, Human Rights Campaign, http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline. Yet, over twenty years later, ENDA is no closer to becoming law. When it was reintroduced just last year, the House refused even to bring it to a vote. *See* Daniel Reynolds, *John Boehner: 'No Way' ENDA Will Pass This Year*, THE ADVOCATE (Jan. 30, 2014), http://www.advocate.com/politics/politicians/2014/01/30/john-boehner-no-way-enda-will-pass-year.

Gay and lesbian citizens in *amici*'s states have been unable to obtain anti-discrimination protections at the state level either. None of the four states of the Sixth Circuit prohibits discrimination against gays and lesbians in private employment or in housing. *See Non-Discrimination Laws: State-by-State Information – Map*,

ACLU, http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map; *LGBT Housing Discrimination*, U.S. Dep't of Housing and Urban Development, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination. In fact, in 2011, after Nashville, Tennessee, passed an anti-discrimination ordinance protecting gays and lesbians, Tennessee immediately introduced a law prohibiting city ordinances that protect groups not already protected at the state level. *See* TENN. CODE ANN. §§ 7-51-1801, 1802. An overwhelming majority of the legislature voted in favor of that bill (20-8 in the Senate and 70-26 in the House), and the governor signed it. *See* HB 600, http://votesmart.org/bill/13389/35457#35161.

In the last few months alone, gay and lesbian Americans have been unable to prevent any of the following abridgements of their rights:

- In March 2015, the Charlotte, North Carolina City Council voted down an ordinance prohibiting discrimination based on sexual orientation. Before the vote, one speaker warned the City Council that they would "stand before a holy God on the day of judgment," and another "sang a song about how roosters and stallions can't reproduce without hens and mares." Ely Portillo & Mark Price, *Charlotte LGBT Ordinance Fails 6-5 in Contentious Meeting*, CHARLOTTE OBSERVER (Mar. 2, 2015), http://www.charlotteobserver.com/news/

local/article11908907.html.

- In February 2015, Arkansas enacted a law forbidding municipal anti-discrimination ordinances that protect groups (such as gays and lesbians) unprotected at the state level. *See* Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, WASH. POST (Feb. 23, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/. It passed by a margin of 24-8 in the Senate and 58-21 in the House. *See* SB202, Arkansas State Legislature, http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=SB202.

- In February 2015, the Governor of Kansas rescinded an executive order protecting gay state employees from discrimination. *See Kansas: Governor Rescinds Order Protecting Gay State Workers*, N.Y. TIMES (Feb. 10, 2015), http://www.nytimes.com/2015/02/11/us/kansas-governor-rescinds-order-protecting-gay-state-workers.html.

- In January 2015, town aldermen in Starkville, Mississippi voted to repeal the town's sexual orientation anti-discrimination resolution and to rescind health benefits for domestic partners of public employees. *See* Laura Conaway, *Mississippi*

Town Repeals Anti-Discrimination Resolution in Secret, MSNBC (Jan. 8, 2015), http://www.msnbc.com/rachel-maddow-show/mississippi-town-repeals-anti-discrimination-resolution-secret.

- In December 2014, Fayetteville, Arkansas repealed the city's sexual-orientation nondiscrimination ordinance by popular referendum, less than four months after it was enacted. *See* Sunnivie Brydum, *Duggars Declare Victory for 'Equality' in Repealing Nondiscrimination Ordinance*, THE ADVOCATE (Dec. 10, 2014), http://www.advocate.com/politics/2014/12/10/duggars-declare-victory-fairness-repealing-nondiscrimination-ordinance.

- In December 2014, legislation that would amend Michigan's Civil Rights Act to prohibit discrimination against gays and lesbians died in committee without a vote, with "[s]everal opponents of the [bill] question[ing] the very idea that gay [Michigan] residents face discrimination." Jonathan Oosting, *'Historic' Gay Rights Hearing Ends Without Vote on Michigan Anti-Discrimination Proposals*, MLIVE (Dec. 4, 2014), http://www.mlive.com/lansing-news/index.ssf/2014/12/historic_hearing_on_gay_rights.html.

- In August 2014, the citizens of Chattanooga, Tennessee, voted by a margin of 63% to 37% to repeal

a city ordinance prohibiting sexual-orientation discrimination and providing domestic-partner benefits. *See* John M. Becker, *Chattanooga Equal Benefits Ordinance Goes Down in Flames*, THE BILERICO PROJECT (Aug. 8, 2014), http://www.bilerico.com/2014/08/chattanooga_equal_benefits_ordinance_goes_down_in_.php. Supporters of repeal argued that the ordinance "giv[es] the benefits reserved for legally married spouses to unmarried girl friends...and boy friends." *Domestic Partner Ballot Initiative*, Citizens for Government Accountability and Transparency, http://www.cgatpac.com/domestic-partner-ballot-initiative.

In sum, the Sixth Circuit's impression that the "bad old days" are behind us is mistaken. As one judge recently observed, when it comes to anti-gay discrimination, "[t]he past is never dead. It's not even past." *Campaign for S. Equality* v. *Bryant*, 2014 U.S. Dist. LEXIS 165913, at *66 (S.D. Miss. Nov. 25, 2014) (quoting William Faulkner, REQUIEM FOR A NUN 92 (1951)).

CONCLUSION

Amici are staunch defenders of the democratic process; indeed, as elected officials and political parties, we live or die by it. But "[t]he Constitution expresses more" than the notion "that democratic processes must be preserved at all costs." *Gobitis*, 310 U.S. at 606 (Stone, C.J., dissenting). Gay and lesbian Americans' fundamental

rights, equal citizenship, and human dignity "may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638.

The Sixth Circuit's judgment should be reversed.

Respectfully submitted.

MARK TOTTEN
MICHIGAN STATE UNIV.
COLLEGE OF LAW
648 N. Shaw Lane
East Lansing, MI 48824

DAVID PEPPER
OHIO DEMOCRATIC PARTY
340 E. Fulton Street
Columbus, OH 43215

GREGORY L. DISKANT
Counsel of Record
TRAVIS J. TU
JONAH M. KNOBLER
JENNY MA
D. BRANDON TRICE
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Ave. of the Americas
New York, NY 10036
(212) 336-2000
gldiskant@pbwt.com

Counsel for Amici Curiae

March 4, 2015